

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON MORGAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

NO 5 1 1 5 7

21811

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable William J. Lindberg
District Judge

FILED

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EUGENE G. CUSHING
United States Attorney

MICHAEL J. SWOFFORD
Assistant United States Attorney

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1 STATEMENT OF JURISDICTION 1/

2 Appellant was charged in the sixth count indictment with
3 violation of the Federal Narcotic laws. Said indictment is
4 set forth as follows (CT 2):

5 "The Grand Jury charges:

6 COUNT I

7 That on or about March 21, 1966 at Seattle, Wash-
8 ington, within the Northern Division of the Western
9 District of Washington, JACKSON MORGAN did knowingly
10 and unlawfully conceal and sell a quantity of narcotic
11 drugs, to wit, approximately 66.921 grams of heroin
12 hydrochloride, knowing the same to have been imported
13 into the United States contrary to law.

14 All in violation of Title 21, U.S.C. , Section 174.

15 COUNT II

16 That on or about April 11, 1966 at Seattle, Wash-
17 ington, within the Northern Division of the Western
18 District of Washington, JACKSON MORGAN did knowingly
19 and unlawfully conceal and sell a quantity of narcotic
20 drugs, to wit, approximately 30.009 grams of heroin
21 hydrochloride knowing the same to have been imported
22 into the United States contrary to law.

23 All in violation of Title 21, U.S.C., Section 174.

24 COUNT III

25 That on or about March 21, 1966 at Seattle, Wash-
ington, within the Northern Division of the Western
District of Washington, JACKSON MORGAN did knowingly
and unlawfully sell, dispense and distribute a quantity
of narcotic drugs, to wit, approximately 66.921 grams
of heroin hydrochloride, not in or from the original
stamped package.

 All in violation of Title 26 U.S.C., Section
4704(a).

1/ In this brief (CT) will refer to the number of the
records herein given by the Clerk of the Court for the
Western District of Washington. (Tr) will refer to the Court
Reporter's transcript of proceedings. (Ex) will refer to
exhibits.

COUNT IV

"That on or about April 11, 1966 at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully sell, dispense and distribute a quantity of narcotic drugs, to wit, approximately 30.009 grams of heroin hydrochloride, not in or from the original stamped package.

All in violation of Title 26 U.S.C., Section 4704(a).

COUNT V

That on or about March 21, 1966 at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully sell a quantity of narcotic drugs, to wit, approximately 66.921 grams of heroin hydrochloride, not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate.

All in violation of Title 26 U.S.C., Section 4705(a).

COUNT VI

That on or about April 11, 1966, at Seattle Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully sell a quantity of narcotic drugs, to wit, 30.009 grams of heroin hydrochloride, not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Trasury or his delegate.

All in violation of Title 26 U.S.C., Section 4705(a)."

Defendant entered a plea of not guilty as to each count on August 16, 1966, (CT 3) and was tried by a jury on January 4, 1967 (Tr). A verdict of guilty was returned by the jury on each count of the indictment on January 4, 1967,

1 and on January 27, 1967, Judgment, Sentence, and Commitment
2 was pronounced and imposed on all counts of the indictment
3 (CT 9).

4 Jurisdiction of the District Court was based on Title
5 18 U.S.C., Section 3231. This Court has jurisdiction in the
6 Appeal under Title 28, U.S.C. Section 1291.

7
8 COUNTERSTATEMENT OF THE CASE

9 The testimony taken at the trial established the
10 following:

11 Joseph Gordon, a King County Deputy Sheriff, was loaned
12 to the Federal Bureau of Narcotics to serve as an undercover
13 agent (Tr 43) and in such capacity was introduced to the
14 defendant, JACKSON MORGAN, on January 13, 1966, by a person
15 named Frank Ealey. Said initial meeting took place in an
16 apartment house located at 2801 Yesler Way, Seattle, Washing-
17 ton, and the only persons present were the defendant, Frank
18 Ealey, and Deputy Sheriff Joseph Gordon (Tr 44). On March 21,
19 1966, Deputy Sheriff Gordon received a telephone call from
20 Defendant Jackson Morgan who advised Gordon that he would be
21 in Seattle in approximately three hours (Tr 45) after which
22 call Deputy Gordon was furnished with \$700.00 of official
23 advance funds with which to purchase narcotics from Defendant
24 Morgan (Tr 48). Later on said date, Deputy Gordon met
25 Defendant Morgan at a Union 76 station in Seattle at which

1 time Morgan offered to sell narcotics to Gordon (Tr 50).
2 A moment thereafter, Defendant Morgan took a small rubber
3 container from his pocket and handed it to Deputy Gordon
4 (Tr 51) after which Gordon gave Morgan the \$700.00 in
5 official advance funds (Tr 52). The rubber container con-
6 tained a grayish white powder which later proved to be
7 61.692 grams of heroin hydrochloride (TR 110 and 112). There
8 was no tax paid stamp affixed to the container (Tr 53) and
9 Deputy Gordon did not have an order signed in blank by the
10 Secretary of Treasury or his delegate for the sale of
11 narcotics (Tr 53). The activities of Deputy Gordon and
12 Defendant Morgan at the Union 76 station were observed from
13 a surveillance post by Agent Joseph Ferro, who was the
14 Senior Agent in charge of the case (Tr 81).

15
16 On April 11, 1966, Defendant Morgan again called Deputy
17 Gordon during which telephone conversation defendant offered
18 to sell Gordon more narcotics (Tr 60). Deputy Gordon was
19 subsequently furnished with \$350.00 in official advance funds
20 by Agent Ferro (Tr 61) and then met the defendant at the
21 Union 76 station at Rainer and Jackson Streets in Seattle
22 (Tr 63). Deputy Gordon entered Defendant Morgan's car and
23 the defendant sold a rubber container containing a grayish
24 powder to Deputy Gordon for \$350.00 (Tr 64). The powder con-
25 tained within the rubber container proved to be 30.009 grams
of heroin hydrochloride (Tr 114). The container did not have

1 a tax paid stamp affixed to it, and Deputy Gordon did not
2 have a written order from the Secretary of the Treasury or
3 his delegate authorizing the sale of narcotics (Tr 65 and
4 66). Narcotic Agent Joseph Ferro observed the activities
5 between Defendant Morgan and Deputy Gordon at the Union 76
6 station from a surveillance point (TR 87).

7 8 QUESTIONS PRESENTED

9 1. Whether the Trial Judge properly sustained Govern-
10 ment's objection to certain testimony on grounds that it was
11 irrelevant.

12 2. Whether the presumptions contained within 21 U.S.C.,
13 Section 174 and 26 U.S.C., Section 4704(a) are constitutional.

14 3. Whether appellant was prejudiced by the Court's
15 giving his Requested Instruction No. 2 in modified form.

16 17 SUMMARY OF ARGUMENT

18 I. The Trial Court properly limited certain questions
19 on cross-examination for being irrelevant and too remote.

20 a. Whether or not evidence is relevant is
21 within the sound discretion of the Trial
22 Court.

23 b. Testimony as to a person called Harvest
24 Edwards was irrelevant and was properly
25 limited.

1 II. The presumptions contained in 21 U.S.C. Section
2 174 and 26 U.S.C. Section 4704(a) have been repeatedly held
3 to be constitutional.

4 III. Appellant was not prejudiced when the Court gave
5 his Requested Instruction No. 2 in modified form.

6
7 ARGUMENTS

8 I & II

9 THE TRIAL COURT PROPERLY LIMITED CERTAIN
10 QUESTIONS ON CROSS-EXAMINATION ON GROUND
11 OF IRRELEVANCY AND REMOTENESS.

12 Appellant argues in specification of error No. 1 and 2,
13 (which will be covered together in this brief) that the
14 trial court erred in restricting the appellant's cross-
15 examination of Agents Gordon and Ferro. Specifically,
16 appellant was attempting to elicit information from said
17 Agents concerning the involvement of a person named Harvey
18 Edwards in this case. After allowing some questioning in
19 said area, the trial court sustained the government's objec-
20 tion to this line of cross-examination on grounds that it
21 lacked relevancy due to remoteness. In the appellant's words,
22 "... the issue is as to whether or not the testimony should
23 have been allowed into evidence..." (appellant's brief
24 page 15).

25 The law is clear that the determination of whether or
not evidence is relevant and should be received is within

1 the sound discretion of the trial court. Glasser v. United
2 States, 315 US 60; Beck v. United States, 298 F 2d 622, 629
3 (9th Cir. 1952). Even the appellant admits this to be the
4 law where he states in his brief that (page 15)

5 "It is conceded that the extent of cross-examination
6 and the determination as to whether or not evidence
7 is relevant is within the sound discretion of the
8 trial court."

9 Hence, it is difficult to visualize how the trial court's
10 rulings on the admissibility of evidence in this case can be
11 an issue in this appeal.

12 It appears as if the only available issue is the
13 possible question of prejudicial abuse of discretion by the
14 trial judge in ruling the evidence irrelevant. However,
15 appellant does not make an argument for this proposition and
16 makes no showing that the excluded evidence would have
17 affected the outcome of the trial. The evidence pointing to
18 the defendant's guilt as to the charges contained in the
19 indictment was overwhelming, consisting of the direct
20 testimony of Agent Joseph Gordon, who was a King County
21 Deputy Sheriff working as an undercover agent for the Federal
22 Bureau of Narcotics at the time of the two sales of narcotics,
23 and the corroborating testimony of Senior Agent Joseph Ferro.
24 Deputy Gordon, the purchaser of the narcotics, testified in
25 great detail as to the actual sale transactions which took
place at the Union 76 station on corner of Rainier Avenue



1 and as to his conversations with the defendant. Agent Ferro
2 observed both of the sale transactions and corroborated
3 Deputy Gordon's testimony.

4 The defendant's attempt during cross-examination to
5 implicate a person called Harvey Edwards in the transactions
6 appears to have been a smoke screen to divert the jury's
7 attention from the real elements of the crime charged.
8 Defense counsel advised the court that he was attempting to
9 prove that the United States Bureau of Narcotics had paid
10 Harvest Edwards to introduce Deputy Gordon, the undercover
11 agent, to the defendant in this case (Tr 95).

12 In response to the defense's question in this area,
13 Gordon stated on cross-examination that he was acquainted
14 with an informant named Harvey Edwards (Tr 69), but that no
15 informant was involved in the case against Defendant Morgan
16 (Tr 73) and that he had never discussed Defendant Morgan with
17 Harvey Edwards (Tr 71). Deputy Gordon further testified that
18 he was introduced to Defendant Morgan on January 13, 1966, by
19 a person called Frank Ealey and that Harvey Edwards was not
20 present at the introduction (Tr 44). Furthermore, the record
21 shows that no third person was present or took part in the
22 two sale transactions at the Union 76 station or in the
23 arrangements for said transactions. Also, Agent Ferro, who
24 was in charge of the case, testified that Harvey Edwards had
25 introduced Agent Gordon to Frank Ealey in another case, but

1 that Harvey Edwards had no part in the case against defendant
2 Morgan (Tr 98). Therefore, the Court properly limited
3 cross-examination on the subject of Harvest Edwards because
4 Edwards had no part in the case against Defendant Morgan.

5 The defense attorney was certainly aware at the very
6 beginning of the trial of the existence of a person called
7 Harvey Edwards, as indicated from his opening statement
8 (Tr 37 through 39) where he states that Harvey Edwards had
9 worked at the World's Fair and from time to time had sold
10 clothing to Jackson Morgan. If Harvey Edwards was involved
11 in any way in the case against Defendant Morgan , it seems
12 logical to assume that defense counsel would have called
13 Harvey Edwards as a defense witness, as suggested by the
14 Court (Tr 69). Also, defendant had in his possession all
15 the Jencks Act statements written by the narcotics agent
16 (Tr 73) and could have used these documents for impeachment
17 purposes, if they contained contradictory statements.
18 However, he chose not to call either Harvey Edwards or to use
19 the Jencks Act statements.

20 In view of the overwhelming evidence concerning the
21 sale transactions between the defendant and Deputy Gordon,
22 it is impossible to visualize how the outcome of the case
23 could have been altered by allowing more questions concerning
24 Harvey Edwards. Accordingly, the trial court did not abuse
25 its discretion in limiting this line of inquiry for being too
remote and irrelevant.

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III & IV

A. THE PRESUMPTION CONTAINED IN 21 U.S.C.
SECTION 174 IS CONSTITUTIONAL.

Appellant contends that the presumption contained within 21 U.S.C. Section 174 is unconstitutional. Said section reads as follows:

"Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains possession to the satisfaction of the jury." 21 U.S.C. Section 174.

The constitutionality of said presumption has been tested before the courts which have repeatedly upheld its constitutionality. Brown v. United States, 370 F. 2d 874 (9th Cir. 1966); United States v. Secondino, 347 F. 2d 725 (2nd Cir. 1965); Orczco-Vasquez v. United States, 244 F. 2d 837 (9th Cir. 1965); Agovian v. United States, 323 F. 2d 693 (9th Cir. 1963); United States v. Gainey, 380 US 63, 85 S. Ct. 754, 13 L.Ed. 2d 658.

Appellant relies upon part of the testimony of the United States Chemist to the effect that the opium poppy can be grown in the United States. It should be noted, however, that the growing of opium poppies in the United States is prohibited by law. 21 U.S.C. Section 188(b). In spite of this testimony by the chemist, there is no other evidence by which the defendant's possession of the narcotics in

1 question could be explained. Hence, the jury could properly
2 follow the court's instruction regarding the presumption
3 that unexplained possession would authorize conviction.

4
5 B. THE PRESUMPTION CONTAINED IN
6 21 U.S.C. SECTION 4704(a) IS
CONSTITUTIONAL.

7 Appellant argues that the presumption contained in
8 Title 26 U.S.C. Section 4704(a) is unconstitutional. Said
9 presumption reads as follows:

10 ".... the absence of appropriate taxpaid stamps
11 from narcotic drugs shall be prima facie evidence
12 of a violation of this subsection by the person
in whose possession the same may be found."
21 U.S.C. Section 4704(a).

13 Said presumption has been held to be constitutional in
14 Smith v. United States, 273 F. 2d 462 (10th Cir. 1959).

15 Appellant contends that in order to rebut the presumption
16 and explain his possession of the narcotics it would be
17 necessary for him to take the witness stand and testify,
18 such requirement violating his Fifth Amendment right to
19 remain silent at trial. The United States Supreme Court has
20 held in United States v. Gainey, 380 US 63 that this type of
21 presumption does not violate the defendant's Fifth Amendment
22 right. This circuit has held likewise in Brown v. United
23 States, 370 F. 2d 874 (9th Cir. 1966).

24 Furthermore, there is ample evidence at the trial to get
25 these two counts of the indictment to the jury and to justify
the court's refusal of defendant's motion for a directed

1 verdict of acquittal. Sufficient evidence is as follows:

2 1. The absence of the necessary tax stamps was
3 established by the testimony of Agent Gordon
4 (Tr 53, 65, and 66).

5 2. The narcotics and their containers were
6 admitted into evidence as government's exhibits
7 Number 1 and 2. The jury could therefore examine
8 said exhibits and note that the necessary tax
9 stamps were not affixed thereto. Furthermore,
10 Agent Gordon testified that the containers were
11 in the identical condition as they were at the
12 time he purchased the narcotics from Defendant
13 Morgan (Tr 66, Tr 51 and 52).

14 Therefore it can be concluded that the trial court
15 properly denied defendant's motion for a judgment of
16 acquittal on accounts 1, 2, 3 and 4 and properly instructed
17 the jury as to the law relating to the presumptions of
18 illegal importation and the absence of tax paid stamps.

19
20 V.

21 THE GIVING OF DEFENDANT'S REQUESTED
22 INSTRUCTION NUMBER 2 IN MODIFIED FORM
DID NOT PREJUDICE DEFENDANT'S CASE.

23 Appellant argues that the Court prejudiced his case when
24 it did not state verbatim that if the evidence was acceptable
25 of two conclusions or constructions, one consistent with the

1 guilt of the defendant and the other consistent with his
2 innocence, that the jury should adopt that construction or
3 conclusion which is most consistent with the defendant's
4 innocence.

5 It should be noted first that appellant's brief does
6 not cite any Federal cases in support of his contention.
7 Secondly, the transcript reveals that the evidence pointing
8 to appellant's guilt was so overwhelming that it could only
9 point to one conclusion. There was not a close issue of fact
10 in this case. And lastly, the Court's instructions covered
11 in great detail the area of presumption of innocence and
12 reasonable doubt. A few excerpts from said instructions are
13 quoted herein.

14 "The law presumes the defendant to be innocent
15 of the crime. Thus, the defendant, although
16 accused, begins a trial with a clean slate;" (Tr 156).

17 "...the presumption of innocence is also
18 sufficient to acquit the defendant unless the
19 jurors are satisfied beyond a reasonable doubt
20 of the defendant's guilt from all of the
21 evidence in the case." (Tr 157).

22 "Defendant is not to be convicted on the mere
23 suspicion or conjecture." (Tr 157).

24 "Reasonable doubt exists in any case when, after
25 careful and impartial consideration of all the
evidence, the jurors do not feel convinced to a
moral certainty that a defendant is guilty of
the offense or offenses charged." (Tr 157).

Considering the overwhelming evidence pointing to the
defendant's guilt, and the Court's careful and detailed


1 instructions as to presumption of innocences and reasonable
2 doubt, it is impossible to see how the Court possibly could
3 have prejudiced defendant's case when it gave his requested
4 instruction Number 2 in modified form.

5
6 CONCLUSION

7 Deputy Sheriff Joseph Gordon testified that on
8 March 21, 1966, and April 11, 1967, he purchased narcotic
9 drugs, heroin hydrochloride, from the defendant, Jackson
10 Morgan. There were no third parties involved in the trans-
11 action. Agent Gordon's testimony was not impeached during
12 cross-examination, and Agent Joseph Ferro also observed both
13 sale transactions from a surveillance point. There was no
14 testimony either directly or indirectly that said sales did
15 not take place as described by Agent Gordon. Accordingly,
16 the evidence overwhelmingly pointed to Defendant Morgan's
17 guilt of the crimes charged in the Indictment and the Govern-
18 ment respectfully urges that this Court affirm the judgment
19 and conviction entered in the District Court.

20 Respectfully submitted,

21 
22 EUGENE G. CUSHING
23 United States Attorney

24 
25 MICHAEL J. SWOFFORD
Assistant U.S. Attorney

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2 CERTIFICATE OF COUNSEL

3 I certify that in connection with the preparation of
4 this brief I have examined Rules 18 and 19 of the United
5 States Court of Appeals for the Ninth Circuit and that in
6 my opinion the foregoing brief is in full compliance with
7 those rules.
8

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10 
11 MICHAEL J. SWOFFORD
12 Assistant U.S. Attorney
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REPORT OF THE SECRETARY

1. The following is a summary of the work done during the year 1993. The work was done in accordance with the plan of work approved by the Council at its meeting on 15/10/92. The work was done in accordance with the plan of work approved by the Council at its meeting on 15/10/92. The work was done in accordance with the plan of work approved by the Council at its meeting on 15/10/92.


Secretary